MOTION FILED
DEC 23 1999
(15)
DEC 23 1999

No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION AND BRIEF OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MATTHEW P. GEARY, ESQ.
Counsel of Record
GOODWIN, SUTTON, DUVAL & GEARY, P.L.C.
Suite 350
1001 East Broad Street
Richmond, Virginia 23219
(804) 643-0374
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23pp

MOTION OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Virginia College of Criminal Defense Attorneys (VCCDA) and the Virginia Trial Lawyers Association (VTLA), move jointly pursuant to Rule 37.2, for leave to file the attached brief of *amici curiae* in support of the Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent has refused consent.

VCCDA, the Virginia affiliate of the National Association of Criminal Defense Lawyers (NACDL), is a statewide non-profit organization of approximately 470 criminal defense practitioners, with the purpose of enhancing the quality of criminal justice in the Commonwealth of Virginia. VTLA is a non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia, working to enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice.

Members of VCCDA and VTLA (hereinafter "*Amici*") are regularly retained or appointed by the courts of the Commonwealth and the United States to represent capital and other criminal defendants, and to represent inmates in habeas corpus proceedings. *Amici* are experienced in the habeas corpus scheme currently operating in Virginia and believe that it is important for the Court to be aware of the height and breadth of the institutional obstacles in that scheme which confront death-sentenced inmates like

Williams in state habeas corpus proceedings. An accurate description of the Virginia habeas proceedings for death-sentenced inmates demonstrates that many of the presumptions of the Court of Appeals for the Fourth Circuit about the potential for factual development in the Virginia habeas corpus scheme are not in line with the scheme itself, or the current practice of the state court in habeas corpus proceedings.

For the foregoing reasons, VCCDA and VTLA respectfully request leave to file the attached brief of *amici curiae* in support of petitioner.

Respectfully submitted,

MATTHEW P. GEARY, ESQ.
GOODWIN, SUTTON, DUVAL
& GEARY, P.L.C.
Suite 350
1001 East Broad Street
Richmond, Virginia 23219
(804) 643-0374

Counsel for Amicus Curiae

Dated: December 23, 1999

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

Table Summary Of Virginia Habeas Corpus Proceedings For Death-Sentenced Inmates After July 1, 1995 5

ARGUMENT 5

THE VIRGINIA STATE HABEAS CORPUS SCHEME FOR DEATH-SENTENCED INMATES DOES NOT PROVIDE REASONABLE AND NECESSARY OPPORTUNITIES FOR THE DEVELOPMENT AND PRESENTATION OF FACTUAL SUPPORT FOR FEDERAL CONSTITUTIONAL CLAIMS..... 5

A. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Summarily Denied The Petition For Writ Of Habeas Corpus Of Every Death-Sentenced Inmate Which Has Been Presented To The Court 7

B. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted An Evidentiary Hearing To Any Death-Sentenced Inmate 8

C. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted Expert Or Investigative Assistance Of Any Kind To Any Death-Sentenced Inmate 9

TABLE OF CONTENTS – Continued

Page

D. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted Discovery Of Any Kind To Any Death-Sentenced Inmate 11

E. The Fourth Circuit Mistakenly Presumes That The Virginia Supreme Court And Virginia General Assembly Are Willing, Or Should Be Willing, To Pay Appointed State Habeas Counsel To Conduct Unreasonably Broad Investigations.... 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Mickens v. Greene, No. 3:98cv102 (E.D. Va. Nov. 5, 1999) 13

Strickler v. Greene, 119 S. Ct. 1936 (1999) 12, 13

STATE CASES

Barnabei v. Director, No. 971459 (Va. 1997).....7, 9, 11

Beck v. Director, No. 980330 (Va. 1999).....7, 9, 10, 11

Burket v. Director, No. 951590 (Va. 1996).....7, 9, 11

Cardwell v. Commonwealth, 450 S.E.2d 146 (Va. 1994) 10

Cardwell v. Director, No. 951593 (Va. 1996).....7, 9, 11

Chandler v. Warden, No. 952348 (Va. 1996) 7

Chichester v. Warden, No. 951591 (Va. 1996).....7, 9, 11

Clagett v. Director, No. 970783 (Va. 1997) 7, 9, 11

Dubois v. Warden, No. 952029 (Va. 1996)..... 7

Fitzgerald v. Angelone, No. 961017 (Va. 1996).....7, 9

Fry v. Angelone, No. 961085 (Va. 1996).....7, 9

Goins v. Warden, No. 962477 (Va. 1997).....7, 9

Graham v. Director, No. 960868 (Va. 1996).....7, 9

Jackson v. Warden, No. 991477 (Va. 1999).....7, 9, 11

Jenkins v. Warden, No. 960246 (Va. 1996).....7, 9

TABLE OF AUTHORITIES – Continued

Page

Joseph v. Warden, No. 952133 (Va. 1996)..... 7, 9, 11

King v. Warden, No. 952099 (Va. 1996)..... 7, 9, 11

Mickens v. Warden, No. 971669 (Va. 1997)..... 7

Ramdass v. Director, No. 951594 (Va. 1996)..... 7, 9, 11

Roach v. Warden, No. 962568 (Va. 1997)..... 7

Royal v. Warden, No. 960620 (Va. 1996)..... 8, 9, 11

Sheppard v. Director, No. 961086 (Va. 1996)..... 8

Stewart v. Angelone, No. 952042 (Va. 1996)..... 8, 9

Swann v. Warden, No. 951583 (Va. 1996)..... 8

Swisher v. Warden, No. 992792 (Va.)..... 10

Thomas v. Warden, No. 960749 (Va. 1996)..... 8

Walton v. Warden, No. 990305 (Va. 1999)..... 8, 9, 11

Weeks v. Warden, No. 952145 (Va. 1996)..... 8

Marlon Williams v. Angelone, No. 970491 (Va. 1997)..... 8, 9, 11

Michael Williams v. Warden, No. 951589 (Va. 1996)..... 8, 9, 11

Terry Williams v. Warden, No. 960534 (Va. 1997)..... 8

Wilson v. Netherland, No. 952118 (Va. 1996)..... 8, 9

Wright v. Warden, No. 951592 (Va. 1996)..... 8, 9

STATE STATUTES AND COURT RULES

Sup. Ct. R. 37.3(a)..... 1

Sup. Ct. R. 37.6..... 1

TABLE OF AUTHORITIES – Continued

Page

Va. Code § 8.01-654..... 6

Va. Code § 8.01-654.1..... 6

Va. Code § 19.2-163.7..... 6

Va. Code § 53.1-232.1..... 6

Va. S. Ct. R. 4:1(b)(5)..... 11

Va. S. Ct. R. 5:7A..... 6, 7

INTEREST OF *AMICI CURIAE*

The Virginia College of Criminal Defense Attorneys (VCCDA) and the Virginia Trial Lawyers Association (VTLA) file this joint brief, *see* Rule 37.3(a), in support of the Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent has refused consent, and *Amici* have sought leave to file this brief from the Court.[1]

VCCDA is recognized by the National Association of Criminal Defense Lawyers (NACDL) as its Virginia state affiliate. VCCDA is a statewide non-profit organization of approximately 470 criminal defense practitioners. Its purpose is to enhance the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the framework of Virginia practice. To that end, VCCDA conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, VCCDA provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system, including litigation advice and support, research, and the filing of amicus briefs.

VTLA is a non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to

---

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than VCCDA, VTLA, and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its special interest sections a Criminal Law Section. Members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

Members of VCCDA and VTLA (hereinafter *"Amici"*) are regularly retained or appointed by the courts of the Commonwealth and the United States to represent capital and other criminal defendants, and to represent inmates in habeas corpus proceedings. *Amici* are experienced in the unique characteristic of the habeas corpus scheme currently operating in Virginia: the Virginia Supreme Court has refused – in an absolute and unwavering manner – every request ever made by a death-sentenced petitioner in habeas proceedings for the court's assistance in allowing an opportunity to develop and present factual support for federal constitutional claims asserted or potential claims alleged.

The inability of death-sentenced petitioners in Virginia to develop and present evidence in state habeas corpus proceedings makes a full and fair development of the record in those proceedings extraordinarily difficult and unlikely. This inability to develop the record is a formidable barrier to meaningful review of the fairness of the convictions and sentences in these cases. This includes the ability to accurately review the quality of representation at the trials and appeals from which these convictions and sentences arose.

The conviction and death sentence of Petitioner, Michael Wayne Williams, was reviewed by the state court under the habeas corpus scheme mentioned above. *Amici* believe that it is important for the Court to be aware of the height and breadth of the obstacle confronting petitioners like Williams in the Virginia courts when Court examines his case. An accurate description of the Virginia habeas proceedings for death-sentenced inmates demonstrates that many of the presumptions of the Court of Appeals for the Fourth Circuit about the potential for factual development in the Virginia habeas corpus scheme are not in line with the scheme itself or the current practice of the state court in habeas corpus proceedings.

The brief of *Amici* will not address every point argued by the parties. Instead, *Amici* focus on a single issue: the formidable and, thus far, insurmountable barriers to obtaining assistance in the state court for factual development in state habeas corpus proceedings.[2]

SUMMARY OF ARGUMENT

Under the habeas corpus scheme currently in operation in Virginia, death-sentenced inmates do not have a meaningful opportunity to develop factual support for federal constitutional claims alleged in their petitions. The system also unreasonably limits the ability of these petitioners to identify, investigate, develop, and present potential claims. Under the extraordinarily restrictive

[2] *Amici* adopt the Petitioner's Statement of Facts.

scheme in place in Virginia, it is virtually pre-ordained that factual support for constitutional claims will not be completed in state habeas corpus proceedings. Habeas petitioners who seek federal habeas corpus review from this system can turn only to the federal courts in hopes of obtaining a full and fair hearing of their claims.

Since the Virginia Supreme Court assumed exclusive jurisdiction of habeas corpus proceedings for death-sentenced inmates in 1995, ***no death-sentenced inmate has ever received an evidentiary hearing, expert or investigative assistance, discovery of any kind, including Brady material, or even so much as permission to serve a subpoena.***

The state court's refusal to provide for factual development is exacerbated by the Fourth Circuit Court of Appeals' unrealistic impression of the abilities of a Virginia death-sentenced state habeas petitioner to obtain and present factual support for his claims. The expectations of the federal court of appeals and the reality of the state supreme court are a clash of contradiction: the court of appeals requires Virginia death-sentenced inmates to develop and present all known or knowable factual support for claims during the course of state habeas corpus proceeding, but Virginia courts deny every effort by death-sentenced inmates to develop and present the same factual support. Virginia death-sentenced inmates are trapped between the proverbial "rock and a hard place."

Amici are committed to preserving the constitutional rights of all criminal defendants. Because *Amici* believe that significant factual development is often vital to a reliable review of the quality and constitutional character

of representation of criminal defendants, and the constitutional adequacy of their convictions and sentences – especially before imposition of the death penalty – *Amici* believe that the decision of the court of appeals in this case must be overturned.

TABLE SUMMARY
OF VIRGINIA HABEAS CORPUS PROCEEDINGS
FOR DEATH-SENTENCED INMATES
AFTER JULY 1, 1995

Number of Cases Reviewed	31
Number of Cases In Which A Hearing Was Granted	0
Number of Cases In Which Expert or Investigative Assistance Was Granted	0
Number of Cases In Which Discovery Was Granted	0
Number of Cases In Which Relief Was Granted	0

ARGUMENT

THE VIRGINIA STATE HABEAS CORPUS SCHEME FOR DEATH-SENTENCED INMATES DOES NOT PROVIDE REASONABLE AND NECESSARY OPPORTUNITIES FOR THE DEVELOPMENT AND PRESENTATION OF FACTUAL SUPPORT FOR FEDERAL CONSTITUTIONAL CLAIMS.

Effective July 1, 1995, the Virginia General Assembly amended and modified habeas corpus proceedings for death-sentenced inmates. The statutory amendments

enacted by the Virginia legislature placed certain time restrictions on habeas corpus proceedings for death-sentenced inmates.[3] The legislation also took jurisdiction over habeas corpus proceedings of death-sentenced inmates away from the local circuit courts and gave exclusive jurisdiction to the Virginia Supreme Court. Va. Code § 8.01-654.C. Not long after the amendments went into effect, the Virginia Supreme Court enacted special provisions further restricting the habeas corpus proceedings of death-sentenced inmates. *See, e.g.*, Va. S. Ct. R. 5:7A (specifying contents of petition and restricting length of petition to fifty pages or less, time for filing Reply, and time for filing Response to motions).

Because Mr. Williams' case was reviewed by the state court under this scheme, the arguments, summaries and other statements relative to habeas corpus proceedings

---

[3] For example, the amendments require that death-sentenced inmates file their petitions within sixty days of the denial of certiorari review after direct appeal (if sought), Va. Code § 8.01-654.1, and set out a specific time frame within which evidentiary hearings, if any, must be conducted and resolved, Va. Code § 8.01-654.C. Prior to these amendments, no time restrictions were placed on habeas petitioners, including death-sentenced petitioners. The 1995 amendments established time limits within which the local circuit courts are required to set execution dates at various points in post-conviction review. Va. Code § 53.1-232.1. The amendments also included a provision that the local circuit appoint counsel for habeas corpus proceedings within thirty days of the affirmance of a death sentence on direct appeal, Va. Code § 19.2-163.7. The provisions for filing deadlines and setting execution dates have been strictly enforced. The mandatory appointment provisions, on the other hand, have not been consistently followed. No evidentiary hearing has been allowed to date.

made *infra* refer only to cases reviewed under the current scheme.[4]

A. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Summarily Denied The Petition For Writ Of Habeas Corpus Of Every Death-Sentenced Inmate Which Has Been Presented To The Court.

Since the Virginia statutes governing the habeas corpus proceedings of death-sentenced inmates were amended in 1995, the Virginia Supreme Court has ruled on thirty-one original habeas petitions from death-sentenced inmates. Every one of these was summarily denied.[5] Every death-sentenced inmate who has sought

---

[4] Williams' petition was filed *after* the 1995 statutory amendments but *prior* to enactment of Va. S. Ct. R. 5:7A.

[5] *See e.g., Barnabei v. Director*, No. 971459 (Va. Oct. 15, 1997) (Order); *Beck v. Director*, No. 980330 (Va. Jan. 28, 1999) (Order); *Burket v. Director*, No. 951590 (Va. Nov. 20, 1996) (Order); *Cardwell v. Director*, No. 951593 (Va. May 3, 1996) (Order); *Chandler v. Warden*, No. 952348 (Va. Aug. 5, 1996) (Order); *Chichester v. Warden*, No. 951591 (Va. Nov. 19, 1996) (Order); *Clagett v. Director*, No. 970783 (Va. Dec. 15, 1997) (Order); *Dubois v. Warden*, No. 952029 (Va. Mar. 15, 1996) (Order); *Fitzgerald v. Angelone*, No. 961017 (Va. Oct. 16, 1996) (Order); *Fry v. Angelone*, No. 961085 (Va. Nov. 19, 1996) (Order); *Goins v. Warden*, No. 962477 (Va. May 5, 1997) (Order); *Graham v. Director*, No. 960868 (Va. Oct. 16, 1996) (Order); *Jackson v. Warden*, No. 991477 (Va. Nov. 18, 1999) (Order); *Jenkins v. Warden*, No. 960246 (Va. June 18, 1996) (Order); *Joseph v. Warden*, No. 952133 (Va. Nov. 20, 1996) (Order); *King v. Warden*, No. 952099 (Va. Mar. 14, 1996) (Order); *Mickens v. Warden*, No. 971669 (Va. Dec. 15, 1997) (Order); *Ramdass v. Director*, No. 951594 (Va. Mar. 18, 1996) (Order); *Roach v. Warden*, No. 962568 (Va. Apr. 30, 1997) (Order);

rehearing of a denial of habeas corpus relief has been refused rehearing. None of the petitioners in these cases had presented a habeas corpus petition to the state court previously.

B. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted An Evidentiary Hearing To Any Death-Sentenced Inmate.

Virginia Supreme Court Rules require the petitioner in a capital habeas proceeding to state whether "the taking of evidence is necessary for the proper disposition of the petition." Va. S. Ct. R. 5:7A(b). Every death-sentenced inmate who has filed a habeas corpus petition has requested that the state court grant an evidentiary hearing at which he would be provided an opportunity to develop and present factual support for his non-defaulted constitutional claims.[6] Every inmate's request

---

Royal v. Warden, No. 960620 (Va. June 18, 1996) (Order); *Sheppard v. Director*, No. 961086 (Va. Oct. 17, 1996) (Order); *Stewart v. Angelone*, No. 952042 (Va. Mar. 18, 1996) (Order); *Swann v. Warden*, No. 951583 (Va. Mar. 18, 1996) (Order); *Thomas v. Warden*, No. 960749 (Va. June 17, 1996) (Order); *Walton v. Warden*, No. 990305 (Va. Aug. 9, 1999) (Order); *Weeks v. Warden*, No. 952145 (Va. Mar. 15, 1996) (Order); *Marlon Williams v. Angelone*, No. 970491 (Va. June 20, 1997) (Order); *Michael Williams v. Warden*, No. 951589 (Va. Mar. 18, 1996) (Order); *Terry Williams v. Warden*, No. 960534 (Va. June 6, 1997) (Order); *Wilson v. Netherland*, No. 952118 (Va. Mar. 15, 1996) (Order); *Wright v. Warden*, No. 951592 (Va. Mar. 14, 1996) (Order).

[6] Every petition mentioned above has included allegations that the convictions and/or sentences imposed were the result of the denial of the constitutional right to effective assistance of counsel. Under Virginia law, such claims can only be presented in state habeas corpus proceedings. Many petitions have also alleged misconduct, including that by prosecutors, police, and jurors.

has been denied without any comment or explanation. *See* Note 5, *supra*.

C. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted Expert Or Investigative Assistance Of Any Kind To Any Death-Sentenced Inmate.

The Virginia Supreme Court has refused every request made by a death-sentenced inmate to obtain the assistance of an expert or investigator to identify, develop, or present factual support for claims alleged in the petition.[7] Every capital petitioner has been indigent at

---

[7] *See e.g.*, *Barnabei v. Director*, No. 971459 (Va. Oct. 15, 1997) (order); *Beck v. Director*, No. 980330 (Va. Aug. 4, 1998) (order); *Burket v. Director*, No. 951590 (Va. June 13, 1996) (order); *Cardwell v. Director*, No. 951593 (Va. Dec. 15, 1995) (order); *Chichester v. Warden*, No. 951591 (Va. Nov. 19, 1996) (order); *Clagett v. Director*, No. 970783 (Va. Dec. 15, 1997) (order); *Fitzgerald v. Angelone*, No. 961017 (Va. Oct. 16, 1996) (order); *Fry v. Angelone*, No. 961085 (Va. Mar. 15, 1996) (order); *Goins v. Warden*, No. 962477 (Va. May 5, 1997) (order); *Graham v. Director*, No. 960868 (Va. June 26, 1996) (order); *Jackson v. Warden*, No. 991477 (Va. Aug. 4, 1999) (order); *Jenkins v. Warden*, No. 960246 (Va. Mar. 5, 1996) (order); *Joseph v. Warden*, No. 952133 (Va. Nov. 20, 1996) (order); *King v. Warden*, No. 952099 (Va. Mar. 14, 1996) (order); *Ramdass v. Director*, No. 951594 (Va. Jan. 19, 1996) (order); *Royal v. Warden*, No. 960620 (Va. June 18, 1996) (order); *Stewart v. Angelone*, No. 952042 (Va. Mar. 18, 1996) (order); *Walton v. Warden*, No. 990305 (Va. Mar. 10, 1999) (order); *Marlon Williams v. Angelone*, No. 970491 (Va. June 20, 1997) (order); *Michael Williams v. Warden*, No. 951589 (Va. Mar. 18, 1996) (order); *Wilson v. Netherland*, No. 952118 (Va. Mar. 15, 1996) (order); *Wright v. Warden*, No. 951592 (Va. Dec. 15, 1995) (order).

the time of his habeas proceedings and required the financial support of the state court in order to obtain the requested assistance.

The Virginia Supreme Court has denied expert assistance even in cases where the court had acknowledged previously that its ability to assess the prejudice resulting from trial counsel's failure to obtain a mental health expert at trial is left to "mere speculation." *See, e.g., Cardwell v. Commonwealth,* 450 S.E.2d 146, 152 (Va. 1994).[8] The state court has never explained the bases for its denials nor cited a legal standard or authority applied in these decisions.

The failure of the state court to allow assistance to death-sentenced inmates has proven especially restrictive because of the Virginia Attorney General's recent practice of advising State experts and investigators familiar with the cases of death-sentenced inmates not to speak with counsel appointed to assist in state habeas corpus proceedings. In these cases, State personnel such as State Police personnel or forensic lab scientists and technicians, after initially discussing the case with habeas counsel, have subsequently told counsel that they had been directed by an Assistant State Attorney General acting as counsel to the particular State Agency involved, not to speak further with petitioner's habeas counsel. *See, e.g., Beck v. Director,* No. 980330 (Va.); *Swisher v. Warden,* No. 992792 (Va.). In these instances, the very same Assistant State Attorney

[8] The state court made this observation in its direct appeal opinion. In state habeas proceedings, Cardwell repeatedly attempted to obtain expert assistance to demonstrate prejudice. Each request was denied.

General was simultaneously acting as counsel for the Respondent.

In these cases, as in all other cases, the petitioners' motions to depose these witnesses, to subpoena documents in their possession, or to have a hearing at which witnesses could be called to testify and produce documents to be entered into evidence, have been refused.

D. Under The Present State Habeas Corpus Scheme The Virginia Supreme Court Has Never Granted Discovery Of Any Kind To Any Death-Sentenced Inmate.

In Virginia, "no discovery shall be allowed in any proceedings for a writ of habeas corpus . . . without prior leave of the court, which may deny or limit such discovery in any such proceeding." Va. S. Ct. R. 4:1(b)(5). The Virginia Supreme Court has never granted discovery of any kind to a death-sentenced inmate.[9] The court has

[9] *See e.g., Barnabei v. Director,* No. 971459 (Va. Oct. 15, 1997) (order); *Beck v. Director,* No. 980330 (Va. Aug. 4, 1998) (order); *Burket v. Director,* No. 951590 (Va. Nov. 20, 1996) (order); *Cardwell v. Director,* No. 951593 (Va. Dec. 15, 1995) (order); *Chichester v. Warden,* No. 951591 (Va. Nov. 19, 1996) (order); *Clagett v. Director,* No. 970783 (Va. Dec. 15, 1997) (order); *Jackson v. Warden,* No. 991477 (Va. Aug. 4, 1999) (order); *Joseph v. Warden,* No. 952133 (Va. Nov. 20, 1996) (order); *King v. Warden,* No. 952099 (Va. Mar. 14, 1996) (order); *Ramdass v. Director,* No. 951594 (Va. Jan. 19, 1996) (order); *Royal v. Netherland,* No. 960620 (Va. June 18, 1996) (order); *Walton v. Warden,* No. 990305 (Va. Mar. 9, 1999) (order); *Marlon Williams v. Angelone,* No. 970491 (Va. June 20, 1997) (order); *Michael Williams v. Warden,* No. 951589 (Va. Mar. 18, 1996) (order).

never cited a legal or factual basis for its denials, and never stated or discussed its reasons for denying discovery.

This Court recognizes that the threshold for obtaining discovery in Virginia habeas proceedings is extraordinarily high, particularly where the petitioner seeks to discover exculpatory information from state agents. *See, e.g., Strickler v. Greene,* 119 S. Ct. 1936, 1950-51 (1999). Detailed information about the limitations on discovery in Virginia post-conviction proceedings is contained in the Brief of the National Association of Criminal Defense Lawyers, Virginia College of Criminal Defense Attorneys, Virginia Trial Lawyers Association, and Virginia Capital Case Clearinghouse as *Amici Curiae* In Support of Petitioner in *Strickler v. Greene,* No. 98-5864, which is incorporated herein by reference.

Respondent has persistently maintained in the state court that he has no obligation to provide petitioners with exculpatory material evidence, and no intention of even attempting to discover whether such information exists. The Virginia Supreme Court has never required Respondent to produce, seek to discover, or make an accounting of the existence of material exculpatory evidence in the possession of the State and unavailable to petitioners. Respondent has stated that he has "no intention . . . of [inspecting and reviewing files] for the purpose of identifying, material, exculpatory evidence." See Joint Appendix at 352.

Although Respondent opposes every attempt made by death-sentenced inmates to obtain opportunities or

assistance to develop factual support for claims made in habeas corpus, he also invariably argues in subsequent federal proceedings, as he has done in Michael Williams' case, that the inmate is absolutely bound by the "universe of facts" he presented in the state habeas corpus proceedings, no matter what kinds of restrictions are placed on the petitioner, or the degree of those constraints. For example, despite this Court's decision in *Strickler,* Respondent continues to maintain that state habeas counsel is obliged to discover and present even evidence to which Virginia law prohibits him access! *See, e.g., Mickens v. Greene,* No. 3:98cv102 (E.D.Va. November 5, 1999).[10]

---

[10] *Mickens* involved a conviction and death sentence for the murder and attempted sodomy of a 17-year old boy. In federal habeas corpus, a state juvenile court clerk accidentally and improperly allowed federal habeas counsel to examine the victim's juvenile records. Those records revealed that the same attorney who accepted appointment to represent Mickens at the capital murder trial, was representing the juvenile victim on charges of assault and carrying a concealed weapon at the time of the capital offense. Respondent argued that, because the court clerk had accidentally and improperly allowed federal habeas counsel to examine the confidential juvenile file, state habeas counsel was obliged to have obtained the same accidental and improper allowances during state habeas corpus proceedings.

In *Mickens,* the District Court found that "state law requirements for secrecy of juvenile court records operated . . . to preclude Mickens from raising the conflict of interest claims in his state habeas petition." Memo Op. at 26. "Nonetheless," the court noted,

> and without any credible decisional support, the Commonwealth persists in asserting that [the claims based upon the juvenile court records] were reasonably available to state habeas counsel because

E. The Fourth Circuit Mistakenly Presumes That The Virginia Supreme Court And The Virginia General Assembly Are Willing, Or Should Be Willing, To Pay Appointed State Habeas Counsel To Conduct Unreasonably Broad Investigations.

Under the system described above, it would be unreasonable for court-appointed state habeas counsel to presume authorization to expend time and resources to identify, locate, examine, and review every potential piece of evidence, and every potential witness, whether or not an initial consideration of the evidence or witness indicated that such a pursuit would be helpful to the review of the case.

The case now before the Court provides an apt illustration of the unmanageable folly which would be produced by the limitless responsibility the court of appeals would impose on petitioner's state habeas counsel. The juror at issue in this case stated under oath that she was not related to any witness in the case even though she was the former wife of a witness – the Deputy Sheriff – and had shared custody of their four children with the witness until the children became adults. The court of appeals' ruling would require attorneys appointed in

---

> federal habeas counsel discovered the factual basis for the claim. It is charitable to call that argument frivolous because the fortuitous circumstances by which federal habeas counsel discovered the truth about [trial counsel's] conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings. . . . To argue otherwise is disingenuous.

Id. at 28-29.

state habeas to investigate and corroborate every specific sworn representation such as that made by the juror or any other person involved in the case.

Under the scheme suggested by the court of appeals, state habeas counsel must engage in every "fishing expedition" imaginable, including those for which all evidence suggests an unproductive result. Because Virginia by statute provides for appointment of counsel, the Commonwealth would be required to compensate counsel for pursuing these unpromising efforts.

Amici strongly maintain that it would be unreasonable to require appointed state habeas counsel to go to the excessive and untenable lengths suggested by the decision of the court of appeals in this case, when there is no indication that these efforts would be considered reasonable or compensable, let alone be endorsed or encouraged, by the state court or legislature which established the parameters of state habeas corpus litigation.

CONCLUSION

For the foregoing reasons, *Amici* urge that the decision of the Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,
MATTHEW P. GEARY, ESQ.
GOODWIN, SUTTON, DUVAL
& GEARY, P.L.C.
Suite 350
1001 East Broad Street
Richmond, Virginia 23219
(804) 643-0374

Counsel for Amicus Curiae